United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

ORIGINAL

75-4224

United States Court of Appeals
FOR THE SECOND CIRCUIT

AMERICAN STEVEDORES, INC., and MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

against

VINCENT SALZANO,

Respondent,

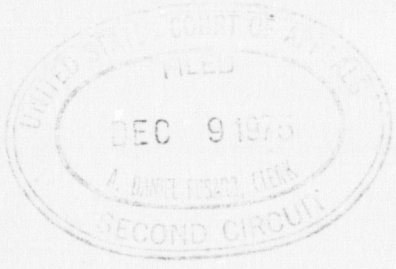
and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,

Respondent.

On Appeal from an Order of the Benefits Review Board U.S.D.L.

BRIEF FOR PETITIONERS



MINORE AND MANES
Attorneys for Petitioners
11 Park Place
New York, New York

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

"the day following the enactment date" of the 1972

TABLE OF CONTENTS

	PAGE
Statement	1
Questions Presented	2
Summary of Argument	2
Facts	3
POINT I—The Board erred as a matter of law by substituting its judgment on a question of fact for that of the Administrative Law Judge, since his determination was supported by substantial evidence	5
POINT II—The Board's failure to pass upon the issue of Constitutionality of Section 10(H)-1 and Section 10(H)-3 on the ground that it was not properly before the Board is error	8
POINT III—The increase in benefits subsequent to November 20, 1972 and the creation of a new and additional liability upon a free enactment award that had become final is violative of the Just Compensation clause of the 5th Amendment of the United States Constitution, in that it takes private property for a public purpose for an inadequate and therefore unjust compensation. Section 10(H)-1 and Section 10(H)-3 of the Longshore and Harbor Workers Act is unconstitutional	9
Conclusion	13

regard to pre-enactment award holders whose awards will

Cases Cited

PAGE

Cardillo v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S.Ct. 801 (1947) 6, 7

Del Vechio v. *Bowers*, 296 U.S. 280; 56 S. Ct. 190 (1935) 6

Kwasizur v. *Cardillo*, 175 F 2nd 235, 3 Cir. (1949) .. 6

Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 327 (1893) 12, 13

O'Keefe v. *Smith Associates*, 380 U.S. 359 (1965) 5

O'Leary v. *Brown Pacific Maxon, Inc.*, 340 U.S. 504, 71 S.Ct. 470 (1951) 7

Paramino Lumber Co. v. *Marshall*, 309 U.S. 370, 378 (1940) 11

Statutes Cited

Longshoremen's and Harbor Workers Compensation Act,

Section 10(H)-1 and 10(H)-3 .....1, 2, 8, 9

Section 21-B-3 5

Fifth Amendment 2, 9, 11, 12, 13

Rules of Practice and Procedure,

Section 802.201 ..... 2, 8

Section 802.301 Title 20, Subparagraph C 6

Amended Act, 33 U.S.C. 910, Section 10 5

MISCELLANEOUS

PAGE

Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960) 10

Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Calif. L. Rev. 216 (1960) 10

118 Cong. Rec. 36271 (1972) 10, 11

H. R. Rept. No. 92-144, 92nd Cong., 2nd Sess. (1972), in (1972) 3 U.S. Code Cong. & Admin. News 4698, at 4699 11

118 Cong. Rec. 36386 (col. 2) (Oct. 14, 1972) 12

1972 Amendments, Section 10 .....9, 11, 12

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN STEVEDORES, INC., and MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

against

VINCENT SALZANO,

Respondent,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,

Respondent.

On Appeal from an Order of the Benefits Review Board U.S.D.L.

BRIEF FOR PETITIONERS

Statement

This is a Petition for Review by American Stevedores, Inc., and Michigan Mutual Liability Insurance Company from an Order of the Benefits Review Board U.S.D.L. (hereinafter referred to as the Employer, Carrier and Board respectively), which reversed an Order of the Administrative Law Judge McGrail, and found that the Respondent, Vincent Salzano, has a permanent total disability and further which declined to pass upon the issue, properly raised, of the constitutionality of Section 10(H)-1 and 10(H)-3 of the Longshoremen's and Harbor Workers Compensation Act (LHCA) as amended.

Questions Presented

1. Did the Board err as a matter of law in substituting its judgment on a question of fact, for that of the Administrative Law Judge, when his determination was supported by substantial evidence? And:

2. Whether the question of Constitutionality of Section 10(H)-1 and Section 10(H)-3 of the L.H.W.C.A. was properly preserved as an issue before the Benefits Review Board?

3. Whether the amendment of Section 10(H)-1 and 10(H)-3 of the L.H.W.C.A. is violative of the just compensation clause of the 5th Amendment and therefore unconstitutional.

Summary of Argument

The Board, in reversing the decision of Administrative Law Judge McGrail, noted that he erred as a matter of law in finding that the claimant did not have a permanent and total disability. This is error, since the decision of the Judge was amply supported by substantial evidence and was beyond the scope of review afforded by the Rules and Regulations which govern the procedure before the Board (20 C.F.R. 802).

Two, the Board failed to pass upon the issue of Constitutionality of Section 10(H)-1 and Section 10(H)-3, on the ground that it was not properly before the Board, is error, since the Petitioners herein were not aggrieved parties within the meaning of Section 802.201, Rules of Practice and Procedure, before the Board, and were not parties adversely affected by the Board's determination. Said issue, however, was raised, arguendo, in the Employer-Carrier's brief filed in response to the Petition for Review before the Board.

Facts

The claimant sustained a myocardial infarction on January 3, 1966. He testified that he has never done any work since that time (21a). He alleges inability to work because of chest pain and that he feels "bla—no power, no pep" (22a).

The pain is relieved by the ingestion of nitroglycerin (22a). He denied performing any work at a lumber yard in Brooklyn over a three month period of time in 1971 (23a). He lives at 54 Woodhollow Road, Great River, Long Island, New York, but sometimes lives with a girlfriend at 1356 64th Street, Brooklyn, New York (24a). This arrangement has been in existence for four years (24a). He drives an automobile as the only means of transportation. He receives social security disability benefits and a pension from the I.L.A. (24a-25a).

He is age forty-four (44) and is separated from his wife (26a). The separation took place after the accident in 1966 because he was "no more a man" (60a). And for the further reason, "I couldn't function as a man" (24a).

He passes his time by "hanging around, going to places, playing cards down at the Union hall, in the garage and in a lumber yard" (27a). He denied working for one Esposito, doing sweeping, handing stock, and waiting on customers (23a). Esposito testified that the claimant would spend a few hours during the course of the day at the lumber yard and would sweep the floor; put some rulers away and hang up some screws (28a).

Dr. Shub, the attending cardiologist, testified that the claimant's subjective complaints play a major part in his opinion of permanent, total disability (29a). He further testified that if claimant's credibility was compromised, he would possibly alter his opinion (29a). He further admitted that the underlying arteriosclerotic process was a

substantial cause of claimant's symptoms (30a). In his comparison of the E.K.G.s, he concluded that there was a change for the better in the recent ones as compared to the earlier ones (30a-31a). He indicated that the myocardial infarction, the scarred area of the heart, caused by the accident was not productive of the symptoms of which the claimant complained (30a).

Dr. Nathaniel Reich, a well-qualified Cardiologist, testified on behalf of petitioners herein that the claimant had a partial disability. In the course of his testimony, he enumerated a number of jobs which the claimant was capable of performing. He, too, noted that there was a vast difference between the symptoms attributable to the underlying arterial sclerotic process and any symptomatology which could be attributed to the myocardial infarction per se. He opined that the claimant's complaints were due to the underlying pathology involving the coronary system. There was no evidence that the infarction itself compromised the functioning of the heart and caused any of the symptoms of which this claimant complained (32a, 36a).

The administrative Law Judge in his decision dated November 18, 1974, has denied a request for the modification of a compensation award dated May 31, 1967 and commented therein that if there has been a change in condition, it has been for the better (9a).

He specifically found that the claimant was not totally disabled on a permanent basis as a result of the injury of January 3, 1966 (9a). In light of this decision, he did not pass upon the issue of Constitutionality raised on Point II of petitioners' brief below.

The Benefits Review Board, in a decision filed on August 20th, 1975, held that the Administrative Law Judge erred as a matter of law in finding that the claimant is not permanently and totally disabled, within the meaning of

the Act. The Board admitted that the petitioners herein contended that certain sub-sections of Section 10 of the Amended Act, 33 U.S.C. 910 which increased the benefits for pre-amendment injuries are unconstitutional in that they authorize the taking of private property without adequate compensation (17a). The Board failed, however, to rule on such issue since the employer failed to submit a notice of appeal and petition for a review requesting adjudication of that particular question of law. The Board concluded that the issue was not properly before the Board (18a).

POINT I

The Board erred as a matter of law by substituting its judgment on a question of fact for that of the Administrative Law Judge, since his determination was supported by substantial evidence.

Section 21-B-3 of the L.H.W.C.A., as amended, provides in part—"The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence." The section in question contains a caveat to the Board which clearly delineates the parameters of the Board's power. The Board's function is circumscribed by the Statute within well defined limits.

O'Keefe v. *Smith Associates,* 380 U.S. 359 (1965).

Judge McGrail heard the medical witnesses and concluded that the original heart attack left the Claimant-Respondent with little, if any, residual disability. He commented that if there had been a change in Claimant's condition, it was for the better.

That conclusion is amply supported by the weight of the credible medical evidence because it paraphrased Dr. Shub's admission that the EKGs taken on a serial basis subsequent to the first attack indicated objectively a resolution of the original scarring for the better.

That, coupled with the fact that scarring itself is not productive of symptomatology whereas the symptoms are directly attributable to the underlying arteriosclerotic process provides support for the Judge's conclusion.

There is no question but what the scarred area of the heart is not productive of the Claimant's symptoms. No physician has testified that the infarcted area contains such nerve endings or blood supply, which could promote the production of symptomatology. The symptoms of which the Claimant complains are part and parcel of underlying arteriosclerotic disease.

Judge McGrail carefully distinguished between the symptoms of the pre-existing disease and those due to the effects of the heart attack. He found that both objectively and subjectively, the disability could only be due to a condition non-causally connected.

The Board has seemingly ignored Section 802.301 Title 20, Subparagraph C, relating to the scope of its review. That part of the Rules and Regulations makes it abundantly clear that the Board is not empowered to engage in a de novo proceeding nor of an unrestricted review of a case brought before it and that the findings of fact made by an Administrative Law Judge may be set aside only in the event that these are not supported by substantial evidence.

Even though the Board may be convinced that the weight of the evidence is contrary to the Administrative Law Judge's finding, it cannot substitute its judgment for his.

> *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469, 67 S. Ct. 801 (1947);
> *Kwasizur* v. *Cardillo,* 175 F 2nd 235, 3 Cir. (1949).

The question of what constitutes substantial evidence has been considered by numerous Courts and commentators. In

> *Del Vechio* v. *Bowers,* 296 U.S. 280; 56 S. Ct. 190 (1935)

the United States Supreme Court has expressly held that substantial evidence is not a larger quantity than any evidence.

As Professor Larson points out in his exhaustive compilation on Workmen's Compensation, "Since the Compensation Board has expressly been entrusted with the power to find the facts, its fact finding must be affirmed if supported by any evidence, even if the reviewing Court believes the evidence points the other way. Larson: Sec. 80.10.

A finding, when supported by credible evidence, must be affirmed even when contrary, not only to the weight, but to the clear preponderance of the evidence.

Cardillo (*supra*).

It cannot be reasonably argued that in this record there is no support to be found for Judge McGrail's decision. He has made a finding that the Claimant-Respondent does not have a permanent total disability causally related to the accident and there is ample evidence to support this.

O'Leary v. *Brown Pacific Maxon Inc.,* 340 U.S. 504, 71 S. Ct. 470 (1951).

It should be noted that the Board was presented with a medical fact issue only. It is obvious therefore that the Board disagreed with the conclusion of the Administrative Law Judge and substituted its own. In so doing, it ignored an important factual keystone upon which the decision of the Administrative Law Judge was predicated. That is the finding that Claimant's permanent total disability was not the result of the injury of January 3, 1966. There is more than a residual of medical evidence to support this finding. His disability is in consequence of his underlying condition, and not the result of the accident.

Both of the physicians who testified agree that the underlying arteriosclerotic process is the cause of the total dis-

ability since there are no symptoms in being which can be related to the myocardial infarction per se.

The Board held that as a matter of law the Administrative Law Judge erred in not finding that the Claimant is permanently and totally disabled within the meaning of the Act. This is somewhat misleading, since he, in fact, did find that the Claimant had a permanent and total disability, but he did not believe it was caused by the injury of January 3, 1966. The Board has improperly intruded upon the province of the Administrative Law Judge and in addition, misconstrued the issue.

POINT II

The Board's failure to pass upon the issue of Constitutionality of Section 10(H)-1 and Section 10(H)-3 on the ground that it was not properly before the Board is error.

The Board's decision reads in part, "The Board declines to rule on such issue since the employer failed to submit a Notice of Appael and Petition for a Review requesting adjudication of that particular question of law. Therefore, the issue is not properly before the Board."

Reference must of necessity be made to the Rules of Practice and Procedure (20 CFR 802), which was specifically devised to govern Board activity. Section 802.201, entitled "who may file an appeal," specifically limits the resort to the Appeal process to a party in interest adversely affected or aggrieved by a decision or order.

Since the Administrative Law Judge had disallowed the claim for total disability, the Petitioners herein were not adversely affected or aggrieved. There was, in fact, no appealable issue before the Board upon which a Notice of Appeal or Petition could be filed.

The relevant statute makes no provision for the Board to issue advisory opinions or declaratory judgments or to even rule upon certified questions.

The record is clear, however, that when Petitioners were served with Claimant-Respondent's Notice of Appeal and subsequent brief, as well as those of the Solicitor of Labor, Petitioner answered such briefs and in Point II of said brief, raised the issue of Constitutionality arguendo.

It is, therefore, respectfully contended that the issue of Constitutionality was properly before the Board and said Board should have passed upon it especially in light of their reversal of the Administrative Law Judge's decision on the issue of causally-related disability.

We feel, therefore, that there has been an error of procedure by the Board and the matter could be remanded for the Board's consideration of the issue of Constitutionality of Section 10(H)-1 and Section 10(H)-3.

Petitioner, however, being cognizent of the existence of a serious question concerning the right and power of the Board to pass upon Constitutional questions raised before it, will pursue said issue before this Court.

POINT III

The increase in benefits subsequent to November 20, 1972 and the creation of a new and additional liability upon a free enactment award that had become final is violative of the Just Compensation clause of the 5th Amendment of the United States Constitution, in that it takes private property for a public purpose for an inadequate and therefore unjust compensation. Section 10(H)-1 and Section 10(H)-3 of the Longshore and Harbor Workers Act is unconstitutional.

Section 10 of the 1972 Amendments adds new subsecsections to Section 10 of the basic (1927) Act which require the recomputation of awards made prior to the 1972 Amendments as if the disability or death had occurred

"the day following the enactment date" of the 1972 Amendments. 86 Stat. 1251, 1258-59.

Can such retrospective legislation validly increase liability upon an award already rendered and final?

The general question of the Constitutionality of retrospective legislation is dealt with in two major law review articles. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv. L. Rev. 692 (1960); Slawson, *Constitutional and Legislative Considerations in Rertoactive Lawmaking,* 48 Calif. L. Rev. 216 (1960). Since the publication of these two articles in 1960, there have been no significant developments in case law in this area. As these articles reveal, the Supreme Court has developed no workable guidelines in deciding legislative retroactivity cases. Each case is weighed on its own merits. Little guidance can be obtained from precedents for a statute like this which, as its Senate sponsor (Senator Williams) remarked, contains a retrospectivity clause which is "a very unique provision." 118 Cong. Rec. 36271 (1972) (37a).

Onlyl once has Congress previously passed a statute aimed at increasing liability on an already-rendered final award under the Longshoremen's and Harbor Workers' Act. There the statute in question was a private Act, allowing the reopening of an individual case after the award had become final by expiration of time for review. This private Act was upheld by the Supreme Court as curative legislation, under the circumstances there present—discovery of continuing disability after finality of the original award. Speaking for the Court, Mr. Justice Reed emphasized:

> "This private act does not . . . create a new right of action. . . . The hearing provided for is subject to the provisions of the general act for longshoremen's and harbor workers' compensation. It does not operate

> to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing injury had been known during the period of compensation, payments of the same amount due under the award authorized by this (private) act would have been due to the employee. In such circumstances we see no violation of the (Fifth Amendment's) due process clause."
>
> *Paramino Lumber Co.* v. *Marshall,* 309 U.S. 370, 378 (1940).

The key words in this passage are those pointing out that the statute there challenged did "not operate to create new obligations where none existed before." That is precisely what Section 10 of the 1972 Amendments does.

There can be no doubt that Congress intended to make the new benefits conferred by the 1972 Amendments retrospective and thereby increase awards theretofore rendered. Not only the text of Section 10, but also the Committee Reports, and the statements of the Senate and House sponsors of the bills in debate, make this plain beyond peradventure. It is even openly acknowledged that this retroactivity will cost money, and an estimate of the cost is spelled out. See H. R. Rept. No. 92-1441, 92nd Cong., 2nd Sess. (1972), in (1972) 3 U.S. Code Cong. & Admin. News 4698, at 4699 and Senator Williams' statement as sponsor, 118 Cong. Rec. 36271 (cols. 2-3) (Oct. 14, 1972), in which he explains that the increased costs due to retroactivity will be financed out of special assessments paid into the Second-Injury fund, and that the Federal Government's share of these increased costs will be "$2 million per year."

In the House, Representative Steiger of Wisconsin, another sponsor, inserted in the record a series of questions and answers on the bill, one of which brought out that, in

regard to pre-enactment award-holders whose awards will be retroactively increased, "Private industry will pay 50% of the cost of the increases for these persons, and the Federal Government will pay the other half." 118 Cong. Rec. 36386 (col. 2) (Oct. 14, 1972) (38a).

The fact that Congress provided that half the increased costs due to retrospectivity would be paid by the Federal Government proves conclusively that Congress considered the upgrading of these old award-holders' benefits a public purpose. But, if that be so, then is not the taking of the other half of the increased cost from the pockets of the insurance carriers and the employers a taking of private property for a public purpose without "just compensation" as required by the Fifth Amendment in the clause of that name?

Doubtless it will be pointed out that the 1972 Amendments abolished (so far as longshoremen and harborworkers are concerned) seaworthiness (no-fault) awards against the vessel, and also abolished the vessel's action over against the employers, where the unseaworthiness was due to the employer's negligence. From this it will be argued that the employers have been given, (and through them their insurance carriers) a *quid pro quo* for the half of the increased costs of retroactivity imposed upon them. It may be so. But it is by no means obvious that the benefit to the employers and their insurance carriers through the abolition of these causes of action will amount to anything like $2 million per year.

If it be argued that Congress has jurisdiction to determine how much the just compensation should be, the answer is that the Supreme Court has denied this emphatically for more than eighty years. In *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 327 (1893), Mr. Brewer, speaking for an unanimous Court, stated:

> "By this legislation, Congress seems to have assumed the right to determine what shall be the measure of

> compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

As several recent cases in the United States Supreme Court show, it has not given up its jurisdiction as the final arbiter of the justice of compensation under the Fifth Amendment.

CONCLUSION

The decision and Order of the Benefits Review Board should be reversed and the claim dismissed with costs to Petitioners.

Dated: December 9, 1975.

Respectfully submitted,

MINORE AND MANES,
Attorneys for Petitioner

JOSEPH F. MANES,
Of Counsel

(59060)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN STEVEDORES, INC., and MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

against

VINCENT SALZANO,

Respondent,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230
That on December 9, 1975, she served 2 copies of Brief for Petitioners and 1 copy of Appendix
on

Angelo C. Gucciardo, Esq.,
Israel Adler Ronca & Gucciardo, Esqs.,
160 Broadway,
New York, New York.

Solicitor of Labor,
Attorney for Director, Office of Workers Compensation Programs,
Division of Employees Benefits
U.S. Dept. of Labor
Washington D. C. 20210

ATT: Linda Carroll

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella
.....

Sworn to before me this
9th day of December, 1975

John V. Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0922050
Qualified in Nassau County
Commission Expires March 30, 1977